87-495

Supreme Court, U.S.
FILED
SEP 5 1987

CASE NUMBER:_____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1987

Paul Adkins Petitioner

vs.

Seaboard System Railroad
Affiliate of CSX Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Debra A. Catron
Attorney for Petitioner
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QUESTIONS PRESENTED

(1) Did the Sixth Circuit Court of Appeals err in determining that Plaintiff, Paul Adkins could not recover under the Federal Employers' Liability Act for his psychiatric injury?

(2) Did the Sixth Circit Court of Appeals err in determining injury was purely psychiatric?

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TABLE OF AUTHORITIES

CASE CITATION

Atchison Topeka and Santa Fe Railway Company V. Buell, _____ U.S. _____, (1987), 55 L W 4362 (1987).

STATUTES

Federal Emplyers' Liability Act, 45 U.S.C. §51 et seq. (FELA).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 821 F2d 340 (6th Cir. 1987. The opinion of the United States District Court for the Eastern District Court for the Eastern District of Kentucky at London is unreported.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on June 18, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS

Federal Employers' Liability Act, 45 U.S.C. §51 et seq. (FELA).

fact that it occurred without warning, Mr. Adkins was left in extreme shock which resulted in him taking a medical leave from the railroad. He later received his disability pension for his mental and physcial condition.

The appellee removed the case to the United States District Court for the Eastern District at London, Kentucky. Upon Motion by appellee for Summary Judgment, the District Court determined that action involved a minor dispute within the Collective Bargaining Agreement and that the defendant was prohibited by the Railway Labor Act 45 U.S.C. §151 et§. from recovering damages under the Federal Employers' Liability Act 45 U.S.C. §51 et seq. (FELA).

EXISTENCE OF JURSIDICTION BELOW

The District Court for the Eastern District of Kentucky had jurisdiction to decide case pursuant to 28 U.S.C. §1331. The Appellant filed an action in Perry Circuit Court seeking damages for his injury on September 10, 1984. Appellee removed this case to United States Federal District Court for the Eastern District of Kentucky in London, Kentucky. Upon Motion by defendant a Summary Motion was granted in favor of appellee with the Court determining that appellant was prohibited from recovering under the Federal Employers' Liability Act in that the Court concluded that the Railway Labor Act prevented the appellant from recovering, holding that the action involved a contractual

dispute within the Collective Bargaining Agreement and the purvue of the Railway Labor Board.

The appellant on June 27, 1986 appealed to the United States Court of Appeals for the Sixth Circuit; the Sixth Circuit Court of Appeals determined on June 18, 1987 that psychiatric injuries were not compensable under the Federal Employers' Liability Act.

STATEMENT

Paul Adkins, a former railroad employer, who is disabled and recovering his disability pension from the railroad, filed a negligence action in Perry Circuit Court in Hazard, Kentucky, seeking damages for his disability. Paul Adkins has been diagnosed as having a twenty-five percent disability. Paul Adkins became disabled as a result of the actions of the appellee in instigating an insubordination proceeding contra to normal procedures against him for failure to return a telephone call. The appellant was employed for at least 37 years with the railroad without blemish on his work record. Mr. Adkins father had been employed with the railroad for over fifty years. Given the immediancy of the proceedings and the

REASONS FOR GRANTING WRIT

The Sixth Circuit Court of Appeals in this case determined that emotional injuries are not compensable under the Federal Employers' Liability Act 45 U.S. C. §51 et seq. (FELA). The Supreme Court in the recent decision of Atchison Topeka and Santa Fe Railway Company V. Buell, _____ U.S. _____ (1987), 55 L W 4362 (1987), while holding that the Railway Labor Act does not prohibit an employee from seeking damages under the Federal Employers' Liability Act even if arbitiation was available, where employee is injured, did not specifically answer the issue of whether emotional injuries are compensable under the Federal Employers' Liability Act. In the case at hand, a man is

disabled but he cannot recover damages because injuries are psychiatric.

In view of the conflict in the decisions of the Nineth and Sixth Circuit decisions, it is important that the Court address whether emotional injuries are compensable under the Federal Employers' Liability Act.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that petition for a Writ of Certiorari should be granted.

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APPENDIX

UNITED STATES OF AMERICA
EASTERN DISTRICT OF KENTUCKY
LONDON

CIVIL ACTION NO. 84-286

PAUL ADKINS PLAINTIFF

VS.

SEABOARD SYSTEM RAILROAD DEFENDANT.

JUDGMENT

In accordance with the Order of even date, it is hereby

ORDERED AND ADJUDGED that plaintiff take nothing and that defendant be and is granted judgment against the plaintiff, with plaintiff to pay the costs of this action.

This 3rd day of June, 1986.

EUGENE E. SILER

EUGENE E. SILER, JR.,
CHIEF JUDGE

NOTICE IS HERBY GIVEN OF THE

ENTRY OF THIS ORDER OR JUDGMENT

ON June 4, 1986

Leslie G. Whitmer, Clerk

By: Elaine M. House D.C.



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

CIVIL ACTION NO. 84-286

PAUL ADKINS PLAINTIFF

VS.

SEABOARD SYSTEM RAILROAD DEFENDANT.

ORDER

In accordance with the Memorandum of even date, it is hereby

ORDERED AS FOLLOWS:

1. Defendant's motion for summary judgment be and is substained.

2. This case be and is dismissed and stricken from the docket.

This 3rd day of June, 1986.

EUGENE E. SILER, JR.
EUGENE E. SILER, JR.
CHIEF JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

CIVIL ACTION NO. 84-286

PAUL ADKINS PLAINTIFF

VS.

SEABOARD SYSTEM RAILROAD DEFENDANT.

MEMORANDUM

This case is before the Court on a motion for summary judgment by the defendant, Seaboard System Railroad. The complaint, which was originally filed in the Perry Circuit Court, alleges that defendant's employees and agents conspired to have plaintiff fired from his job with the defendant by falsely charging him with insubordination for failure to return a phone call. Plaintiff seeks compensatory damages

for emotional distress, physial pain, and psychiatric disability caused by the incident as well as punitive damages. Defendant removed the case to this Court and seeks dismissal for lack of subject matter jurisdiction.

Minor disputes, that is controversies regarding the meaning of an existing collective bargaining agreement, must be referred to the National Railroad Adjustment Board for resolution prior to filing suit. Andrews V. Louisville & Nashville Railroad, 406 U.S. 320, 325-26 (1972); Mc Kinney V. International Assoc. of Machinists, 624 F. 2d 745, 748-49 (6th Cir. 1980). Rule 39 of the collective bargaining agreement in this case deals with unjust treatment.

The rule states that "(an) employee who considers himself unjustly treated shall have the same right of investigation, hearing, appeal, and representation as provided in Rule 37." Obviously, the unjust treatment which plaintiff alleges to have occured in this case is covered by the language of the collective bargaining agreement. Accordingly, the case must be dismissed for lack of subject matter jurisdiction by an appropriate order of even date. McKinney at 748.

This 3rd day of June, 1986.

EUGENE E. SILER, JR.
EUGENE E. SILER, JR.
CHIEF JUDGE

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 86-5715

PAUL ADKINS
PLAINTIFF-APPELLANT,

V.

SEABOARD SYSTEM RAILROAD
DEFENDANT-APPELLEE.

Before: WELLFORD AND NORRIS, CIRCUIT JUDGES: AND COHN, DISTRICT JUDGE.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

This Cause came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the

same is hereby affirmed.

IT IS FURTHER ORDERED that Defendant-Appellee recover from Plaintiff-Appellant the costs on appeal as itemized below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

JOHN P. HEHMAN
CLERK

A TRUE COPY.
ATTEST:

MICHELE P. MAR

Received
6-22-87

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 86-5715

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PAUL ADKINS,
Plaintiff-Appellant,
v.
SEABOARD SYSTEM RAILROAD,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed June 18, 1987

Before: WELLFORD and NORRIS, Circuit Judges; and COHN, U.S. District Judge.*

PER CURIAM: Appellant Paul Adkins, a former railroad employee now receiving disability pension benefits, has sued Seaboard System Railroad (Seaboard), his former employer, for emotional distress with respect to the circumstances of what he claims was a threatened discharge for insubordination.

Adkins initially sought relief through the grievance procedures under his collective bargaining agreement. He desig-

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*The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

nated his union as his collective bargaining agent and requested an investigation under that agreement. The investigation request was based on the same alleged "conspiracy" (between Seaboard and two of appellant's superiors, who supervised him) to fire Adkins, which is at issue here. The investigation resulted in a finding of no violation of the collective bargaining agreement. Adkins did not appeal the result of this hearing.

Adkins then filed a complaint alleging that defendant's employees "deliberately and premeditately [sic] conspired to have the Plaintiff terminated without any regard to the possible consequences of their actions . . . culminating in him suffering great emotional distress and physical pain as a result of these actions." In her brief, Adkins' counsel states that her client "is not seeking damages for embarassment, harassment, or emotional harm as has been the fact situation in most of the cases"[1] relied upon by Seaboard and the trial court, which granted appellee judgment.

The district court dismissed the case for lack of jurisdiction, ruling that the National Railroad Adjustment Board had exclusive jurisdiction over the case. Adkins now appeals that ruling and asserts that the court has jurisdiction to hear the claim under the Federal Employers' Liability Act. The issues on appeal are whether this action for "deliberately" acting to have appellant terminated, which culminated in "great emotional distress," falls within the exclusive jurisdiction of the National Railroad Adjustment Board (NRAB) under the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.*, as determined by the district court, and whether the action is cognizable within the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*.

Judge Siler decided that this was a "minor dispute . . .

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[1]Appellant's brief later makes clear that Adkins is seeking "damages for his psychiatric disability."

regarding the meaning of an existing collective bargaining agreement" and thus must come within the jurisdiction of the NRAB, citing *Andrews v. L & N Railroad Co.*, 406 U.S. 320, 322 (1972) and *McKinney v. International Ass'n of Machinists*, 624 F.2d 745, 748 (6th Cir. 1980), because "the unjust treatment" alleged by appellant "is covered by the language of the collective bargaining agreement."

An unpublished decision of this court in *Antalek v. Norfolk and Western Co.*, No. 84-3057 (6th Cir. Aug. 30, 1984), supports the district court's decision. Plaintiff Antalek sued his former railroad employer for intentional infliction of emotional distress resulting from various supervisors harassing him in conspiracy with a view to terminating him. This court held that the claim came "within the purview of the RLA and, therefore, exclusive jurisdiction lies in the hands of the NRAB." *Antalek*, slip op. at 2 (citing *Andrews, supra; McKinney, supra*).

Shortly before the oral argument in this case, however, the Supreme Court held that "[t]he fact that an injury otherwise compensable under the FELA was caused by conduct that may have been subject to arbitration under the RLA does not deprive an employee of his opportunity to bring an FELA action for damages. *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, _ U.S. _, 107 S. Ct. 1410, 1415 (1987). Assuming that *Buell* applies retroactively to this case, we would be called upon to reverse the district court's ruling that the NRAB has exclusive jurisdiction over Adkin's claim.

Our analysis, however, does not end with a ruling that, in light of *Buell*, the RLA is not the exclusive avenue for this claim. In *Buell* the Court ruled only that a claim "otherwise compensable under the FELA" may be pursued under the FELA despite the applicability of arbitration under the RLA. In this case, we find that Adkins has not asserted a claim that is otherwise compensable under the FELA.

We note that the Court in *Buell* referred only to *negligent* conduct as giving rise to an FELA claim. *See* _ U.S. at _,

_, 107 S. Ct. at 1413, 1415. Although *Buell* notes that the FELA has been held to apply to some intentional torts, _ U.S. at _, 107 S. Ct. at 1414 n.8, the FELA has not been applied to any intentional torts lacking any physical dimension such as assault. *Antalek*, slip op. at 2-3; *Lancaster v. Norfolk and Western Railway Co.*, 773 F.2d 807, 813 (7th Cir. 1985), *cert. denied*, 107 S. Ct. 1602 (1987). The *Buell* Court expressly declined to decide whether "purely emotional injuries" are cognizable under FELA, _ U.S. at _, 107 S. Ct. at 1417, and we have held that a claim for intentional infliction of emotional distress is not cognizable under the FELA. *Antalek*, slip op. at 2-3.

Adkins' attorney has attempted on appeal to characterize his claim as a negligence claim, but the complaint and facts alleged by Adkins indicate that the claim is clearly one for intentional infliction of emotional distress. The complaint mentions only "deliberate" and "premeditated" acts and makes no reference whatever to negligence or lack of due care. The alleged injury itself, moreover, is purely emotional. *See supra* note 1. We hold therefore that this claim of an intentional tort resulting in a purely emotional injury is not cognizable under the FELA.

Accordingly, we **AFFIRM** the dismissal of Adkins' claim because the claim is not cognizable under the FELA.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition for Petitioner was served by mailing a true copy of the same to the Honorable Larry Deener, of Landrum, Shouse and Patterson, 200 Security Turst Blds., Lexington, Kentucky 40507, this the 4th day of September, 1987.

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